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8 10-55765

9 **IN THE UNITED STATES BANKRUPTCY COURT**
10 **FOR THE DISTRICT OF ARIZONA**

11 IN RE:

12 Mario A. Santiago and Carla Santiago

13 Debtors.

14 _____
15 Wells Fargo Bank N.A..

16 Movant,

17 vs.

18 Mario A. Santiago and Carla Santiago, Debtors; Gayle
E. Mills, Trustee.

19 Respondents.
20

No. 4:10-bk-39618-EWH

Chapter 7

MOTION FOR RELIEF FROM THE
AUTOMATIC STAY

RE: Real Property Located at
1029 E. Canyon Trl.
Queen Creek, AZ 85143

21
22 Movant hereby requests an order granting relief from the automatic stay of 11 U.S.C. §
23 362(a) in order to permit Movant to foreclose the lien of its Deed of Trust on the above-
24 referenced real property (the "Property"), in which debtor and debtor-in-possession, Mario A.
25 Santiago and Carla Santiago

26 ("Debtors"), assert an ownership interest, by non-judicial or judicial foreclosure and to
27 obtain possession and control of the Property. Movant further seeks relief in order to contact the
28 Debtors by telephone or written correspondence regarding a potential Forbearance Agreement,

1 Loan Modification, Refinance Agreement, or other Loan Workout/Loss Mitigation Agreement,
2 and may enter into such agreement with debtors. However, Movant recognizes that it may not
3 enforce, or threaten to enforce, any personal liability against Debtors if Debtors' personal liability
4 is discharged in this bankruptcy case.

5 Movant seeks relief from the automatic stay pursuant to 11 U.S.C. §§ 362(d)(1) and
6 (d)(2). Under 11 U.S.C. § 362(d)(2), stay relief must be granted because Debtors have no equity
7 in the Property and the Property is not necessary to an effective reorganization. Under 11 U.S.C.
8 § 362(d)(1), stay relief must be granted because the Debtors are not able to adequately protect
9 Movant's interest in the Property.

10 This motion is supported by the attached Memorandum of Points and Authorities, which is
11 incorporated herein by this reference.

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **I. JURISDICTION AND VENUE**

14 This Court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 157 and
15 1334. Venue of these proceedings and the Motion is proper in this District pursuant to 28
16 U.S.C. § 1409. The statutory bases for the relief requested are 11 U.S.C. §§ 105 and 362(d).

17 **II. FACTUAL BACKGROUND**

18 Mario A. Santiago and Carla Santiago filed a voluntary petition for protection under
19 Chapter 7 of the Bankruptcy Code. Gayle E. Mills was appointed Trustee of the bankruptcy
20 estate.

21 On or about February 2, 2009 Debtors obtained a loan in the original principal amount of
22 \$188,891.00 (the "Loan") from Mortgage Electronic Registration Systems, Inc. as Nominee
23 Mortgage Services III, LLC. The Loan is evidenced by a Promissory Note and Deed of Trust
24 executed by Debtors. A true copy of the Note and Deed of Trust are attached hereto as,
25 respectively, Exhibits "A" and "B" and incorporated herein by reference. The Deed of Trust
26 secures Debtors' payment and performance obligations under the Promissory Note.

27 After the date of the Loan, Mortgage Electronic Registration Systems, Inc. as Nominee
28 Mortgage Services III, LLC transferred its rights in and to the Promissory Note and Deed of

1 Trust. Specifically, Mortgage Electronic Registration Systems, Inc. as Nominee Mortgage
2 Services III, LLC executed an Endorsement transferring the Promissory Note to Wells Fargo
3 Bank N.A... A true copy of the Endorsement is attached to the Note and incorporated herein by
4 reference.

5 Further, Movant is the assignee of the Deed of Trust. The chain of title is set forth below:

6 **Recording Date** **Assignment of Beneficial Interest**

7 Mortgage Electronic Registration Systems, Inc. as Nominee Mortgage
8 Services III, LLC to Wells Fargo Bank, N.A.

9 A true copy of the assignment is attached hereto as Exhibit "C" and incorporated herein by this
10 reference.

11 By virtue of the Promissory Note and Deed of Trust, and the subsequent transfer thereof,
12 Movant has a secured interest in the Property and a secured claim against Debtor. Movant may
13 seek leave of Court to specify any further encumbrances against the Property at the time of the
14 Preliminary and/or Final Hearing hereon.

15 As of the date of this Motion, Debtors are indebted to Wells Fargo Bank N.A.. in the
16 principal amount of \$185,385.16, plus accruing interest, costs, and attorneys' fees.

17 **III. LEGAL ARGUMENT**

18 Stay relief must be granted under Section 362(d) of the Bankruptcy Code:

19 (1) for cause, including the lack of adequate protection of an interest in property
20 of such party in interest;

21 (2) with respect to a stay of an act against property under subsection (a) of this
22 section if – (A) the debtor does not have an equity in such property; and (B)
23 such property is not necessary to an effective reorganization.

24 11 U.S.C. § 362(d).

25 Considering either ground upon which stay relief must be granted, Movant meets its
26 burden under the facts of this case. *See* 11 U.S.C. 362(g).

27 Further, Movant is entitled to its attorneys' fees and costs incurred in seeking stay relief.

28 **A. Movant is entitled to stay relief under Section 362(d)(2) because Debtor has
no equity in the Property and the Property is not necessary to an adequate**

1 **reorganization of Debtor.**

2 **1. Debtors have no equity in the Property.**

3 In determining whether there is equity in the Property, the Court considers all
4 encumbrances, costs and fees. *Stewart v. Gurley*, 745 F.2d 1194, 1199 (9th Cir. 1984). As of the
5 date of this Motion, the balance under the Promissory Note is \$185,385.16, plus accruing
6 interest, costs, and attorneys' fees. The Debtors admit that the value of Debtors interest in the
7 Property is no more than , less ten percent (10%) cost of marketing, less the first and second
8 secured liens resulting in no equity, pursuant to Debtors' Schedule "A", Therefore, the amount
9 due under the Loan exceeds the admitted value of the Property and Movant satisfies its burden
10 regarding a lack of equity in the Property. A true and correct copy of the Debtors' Schedule "A" is
11 attached hereto as Exhibit "D".

12 Further, pursuant to Debtors' Statement of Intentions the debtors intend on surrendering
13 debtors interest in the subject property. A true and correct copy of the Debtors' Statement of
14 Intention is attached hereto as Exhibit "E".

15 **2. The Property is not necessary to an effective reorganization.**

16 Debtors have the burden to prove that the Property is necessary to effect a reorganization
17 and that there is a likelihood of a successful reorganization. *See United Savings Ass'n of Tex. V.*
18 *Timbers of INwood Forest Assocs., Ltd.*, 484 U.S. 365, 375-76, 108 S.Ct. 626, 632-33 (1988).
19 Here, Debtor has not sufficiently set forth any evidence that meets either requirement.

20 **B. Under Section 362(d)(1) Movant is entitled to stay relief for cause.**

21 "Cause" is not defined in the Bankruptcy Code. Therefore, it is at the Court's
22 discretion to determine whether cause exists. *In re Beguelin*, 220 B.R. 94, 98 (9th Cir. BAP.
23 1998) (citing *In re Tucson Estates, Inc.*, 912 F.2d 1162, 1169 (9th Cir. 1990)). Cause exists here
24 because Movant's interest in the Property is not being adequately protected.

25 At the time of filing, Debtors are past due under the Loan for 07/01/2010 12:00:00 AM.
26 Debtors' failure to pay, as well as the accrued and accruing interest, costs, and attorneys' fees,
27 continues to prejudice the Movant. Therefore, Movant must be provided with stay relief and
28 allowed to enforce its rights against the Property in order to protect its secured interests.

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C. Movant is entitled to attorneys’ fees and costs.

Pursuant to the Promissory Note and Deed of Trust, Movant is allowed to request this Court to grant reasonable attorneys’ fees and costs. *See* Exhibits “A” and “B”. Such request is also supported by 11 U.S.C. § 506(b).

IV. CONCLUSION

For the foregoing reasons, Movant respectfully requests that this Court grant this Motion and permit Movant to foreclose the lien of its Deed of Trust on the Property by non-judicial or judicial foreclosure and to obtain possession and control of the Property. Such action would also permit Movant to contact the Debtors by telephone or written correspondence regarding a potential Forbearance Agreement, Loan Modification, Refinance Agreement, or other Loan Workout/Loss Mitigation Agreement, and may enter into such agreement with debtors.

Finally, Movant respectfully requests that this Court grant Movant its reasonable attorney’s fees and costs.

DATED this 28th day of December, 2010.

TIFFANY & BOSCO, P.A.

By /s/ LJM # 014228
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